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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

## No. 885

BERNARD P. CALHOUN,
*Appellant,*

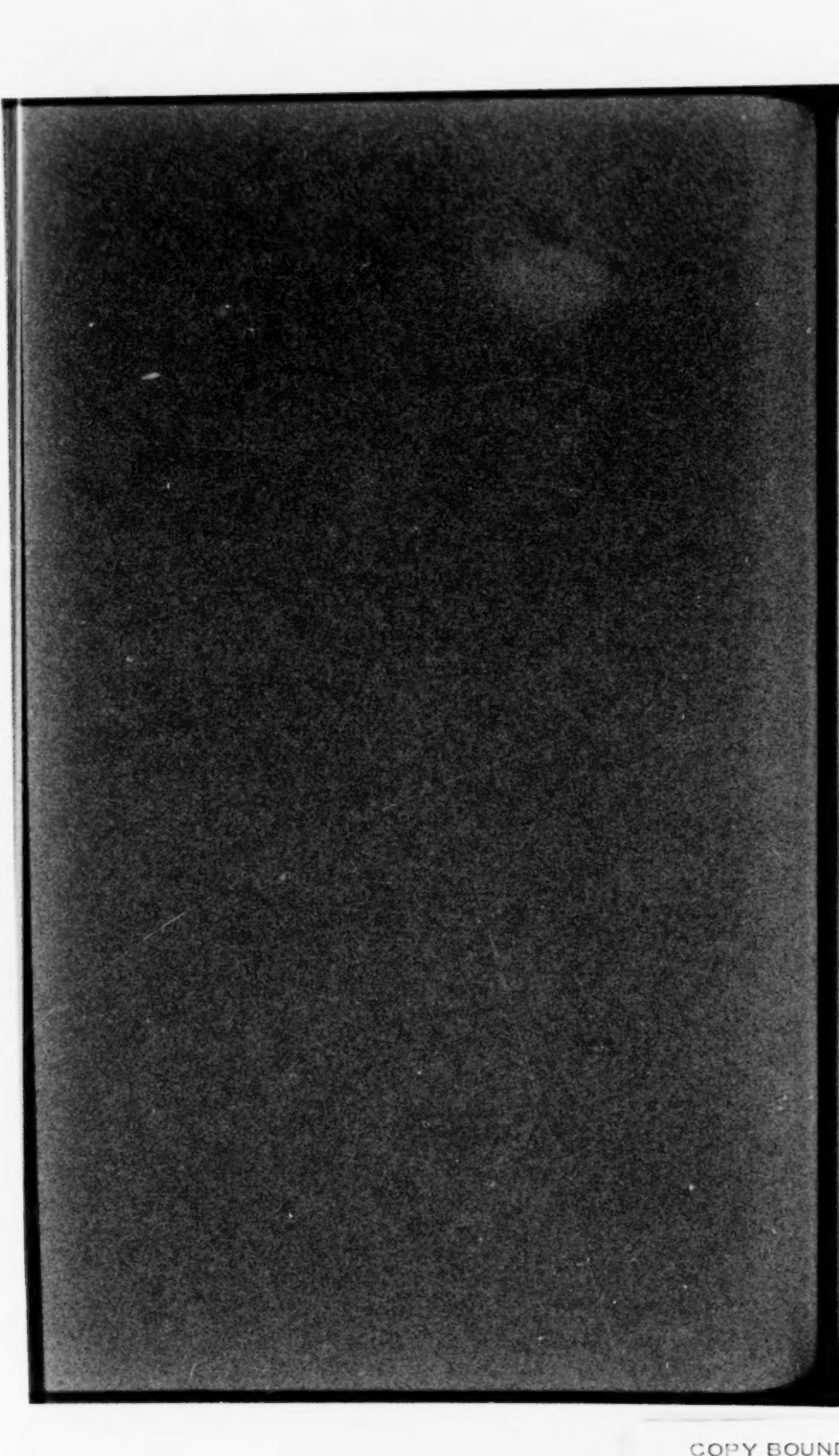
vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, and HONORABLE JOHN A. HEWICKER, Judge of said Court,
*Appellees.*

Appeal from the Supreme Court of California.

## MOTION TO DISMISS.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
600 State Building, San Francisco 2, California,
*Counsel for Appellees.*



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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, and HONORABLE JOHN A. HEWICKER, Judge of said Court,
*Appellees.*

**Appeal from the Supreme Court of California.**

## MOTION TO DISMISS.

Appellees, the Superior Court of the State of California, in and for the County of San Diego, and Honorable John A. Hewicker, Judge of said Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to dismiss the appeal in the above entitled case on the grounds:

(a) that the case was not docketed within the time required by law; and (b) that the appeal does not present a substantial federal question.

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**STATEMENT OF THE CASE.**

The appellant Calhoun and his co-conspirator William G. Bonelli, a member of the California State Board of Equalization, the California liquor licensing agency, were indicted by the Grand Jury of San Diego County of (1) conspiracy to violate[1] section 5002.5 of the California Elections Code (a conspiracy to solicit money from licensees of the California State Board of Equalization), and (2) conspiracy (two counts) to violate[2] section 182, subd. 5 of the Penal Code of California (a conspiracy to commit acts injurious to the public health, to public morals, etc.)

Appellant applied to the California Courts for a writ of prohibition to prohibit a trial of the charges

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[1]Section 5002.5 of the Elections Code of California provides:

"Any elective State officer who is authorized by law to issue licenses, or who is a member of any board or agency authorized to issue licenses, or any person seeking election to such office, board or agency, who directly or indirectly solicits, receives or agrees to receive any money or other thing of value, or any promise thereof, from any licensee named in, or any holder of, any license issued by such officer, board or agency, or from any agent of such licensee or license holder, for any political campaign of any person seeking election or reelection to the office, board or agency authorized to issue such license, is guilty of a misdemeanor."

[2]Section 182 of the Penal Code of California provides:

"If two or more persons conspire:

* * * * * * *

"5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws. * * *"

set out in the indictment on the grounds (1) that the evidence before the Grand Jury did not establish probable cause for the indictment, (2) that subd. 5 of sec. 182 of the California Penal Code is repugnant to the 14th Amendment to the United States Constitution and (3) that sec. 5002.5 of the California Elections Code is likewise repugnant to the 14th Amendment to the United States Constitution.

Ultimately the prohibition proceeding reached the Supreme Court of California and was decided adversely to appellant Calhoun by that Court.

The issues raised by appellant in the Court below and disposed of by that Court are recited in its opinion as follows:

> "In support of his petition for a writ of prohibition Calhoun urges that the evidence before the grand jury finds no reasonable basis for the charges against him. He also contends that the writ should issue because the trial judge expressed bias and prejudice to set aside or quash the indictment. Finally, he attacks both section 5002.5 of the Elections Code and section 182, subdivision 5, of the Penal Code as being unconstitutional." (Appendix to Jurisdictional Statement, page 12, *Calhoun v. Superior Court*, 46 A.C. 16, 25.

**Chronological statement of steps on appeal.**

The decision of the California Court was rendered on **December 30, 1955.**

The decision became final by denial of a petition for a rehearing on **January 25, 1956.**

Notice of appeal to this Court was filed by appellant in the office of the clerk of the California Supreme Court on **January 27, 1956,** and a stay and supersedeas was granted by Mr. Justice Carter of the California Court.

An Amended Notice of Appeal was filed by appellant with the clerk of the California Court on **February 8, 1956** and another stay and supersedeas was granted by Mr. Justice Carter.

No supersedeas bond was offered or filed.

The Statement as to Jurisdiction was filed and the Record was docketed in this Court on **April 20, 1956,** more than 60 days after the filing of the Notice of Appeal and/or the Amended Notice of Appeal.

As far as appellee is advised, no extension of time within which to file and docket the case has been obtained.

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## QUESTIONS PRESENTED.

**1. Notice of Appeal.**

According to the Notice of Appeal (page 3) the following questions are presented on this appeal:

> "(a) The statute (California Elections Code, section 5002.5) which the indictment charges was violated by appellant is contrary to the Fourteenth Amendment to the Constitution of the United States, in that it is legislation based upon an arbitrary classification of the persons included within its scope, is not of uniform operation, and is void for vagueness and uncertainty.

"(b) If it be assumed that the statute (California Elections Code, section 5002.5) is constitutionally valid, nevertheless the indictment is based upon an intentional and wilful discrimination against appellant and, therefore, is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

"(c) The indictment, and each count thereof, is void for vagueness and uncertainty and for failure to define an offense under the Fourteenth Amendment to the Constitution of the United States."

**2. Amended Notice of Appeal.**

In the Amended Notice of Appeal the appellant repeats (a) and (b) above and amends (c) and adds (d) as follows:

"(c) The indictment, and each count thereof, is void for vagueness and uncertainly and for failure to define an offense under the Fourteenth Amendment to the Constitution of the United States.

"(d) The conspiracy statute (California Penal Code, section 182, subd. 5), which the indictment charges was violated by appellant, is void because contrary to the Fourteenth Amendment to the Constitution of the United States, in that said statute is so vague, indefinite and uncertain that it fails adequately to define the offense or to prescribe reasonable standards for determining the guilt of a person charged with a violation thereof. The constitutional validity of said statute was drawn in question below, because repug-

nant to the Fourteenth Amendment to the Constitution of the United States and the decision of the court below was in favor of its validity."

**3. Jurisdictional Statement.**

The jurisdictional statement repeats the questions raised in the Notice of Appeal and Amended Notice of Appeal and raises two additional questions.

The additional questions are here set out:

"3. Whether, if it be assumed that Section 5002.5 of the California Elections Code is constitutionally valid, nevertheless the indictment is based upon an intentional and wilful discrimination against appellant and, therefore, is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the indictment in said criminal action, and each count thereof, is void for vagueness and uncertainty and for failure to define an offense, under the Fourteenth Amendment to the Constitution of the United States."

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## SUMMARY OF ARGUMENT.

### I.

The Record and Jurisdictional Statement Not Having Been Docketed Within Sixty Days After the Filing of the Amended Notice of Appeal the Appeal Must Be Dismissed.

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II.

The Case Does Not Present a Substantial Federal Question.

A. Subdivision 5 of section 182 of the California Penal Code adequately defines the offense and gives reasonable standards for determining guilt.

B. Section 5002.5 of the California Elections Code is not based on an arbitrary classification of the persons included within its scope, is of uniform operation, is not vague and uncertain, and does not discriminate against appellant.

C. If appellant is attacking the indictment as a pleading he is foreclosed from doing so because this contention was not raised in the Court below.

III.

In the Present Posture of the Case the Questions Presented Are Not Ripe for Decision by the Supreme Court of the United States.

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**ARGUMENT.**

I.

**THE RECORD AND JURISDICTIONAL STATEMENT NOT HAVING BEEN DOCKETED WITHIN SIXTY DAYS AFTER THE FILING OF THE AMENDED NOTICE OF APPEAL THE APPEAL MUST BE DISMISSED.**

The Amended Notice of Appeal was filed on February 9, 1956 and the case was docketed on April 20, 1956—more than 60 days after the filing of the Amended Notice of Appeal.

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It is the duty of the appellant to docket the case and file the record thereof with the clerk of this Court within sixty days after the filing of the notice of appeal. The jurisdictional statement must be filed with the record. (Rule 13.) Of course, *for good cause,* the time may be extended by a judge of the lower Court or in a proper case by a justice of this Court. We have not been served with an order extending time to docket and know of no good cause for the delay. The trial of this case has been delayed for approximately sixteen months.

In the case of *United Public Workers v. Mitchell,* 330 U.S. 75, 91 L. Ed. 754, this Court recognized a need for extension of time to docket in cases where large records are involved but stated that in view of the recognized congressional purpose to quicken review the discretion to delay final hearing will be exercised only on a definite showing of need. No showing has been made here.

Where an application for an extension is made, it must be presented before the expiration of the sixty-day period.

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## II.

### THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

**A. Subdivision 5 of section 182 of the California Penal Code adequately defines the offense and gives reasonable standards for determining guilt.**

The Second and Third Counts of the Indictment (page 52, et seq. of the Jurisdictional Statement) each

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charge a conspiracy to do acts injurious to public morals and to pervert and obstruct justice and due administration of the laws in violation of subdivision 5 of section 182 of the Penal Code.

Appellant attacks the section as repugnant to the Fourteenth Amendment on the ground that it is so vague and indefinite that it fails to adequately define the offense or to give reasonable standards for determining guilt. Great reliance is placed on the case of *Musser v. Utah,* 333 U.S. 95, 92 L. Ed. 562. The *Musser* case did not hold the Utah statute then under attack to be unconstitutional. It referred the case back to the Utah Courts for further consideration.

The statute here under attack has been defined and applied by the California Courts so as to avoid the vice pointed out in the *Musser* case. (*Lorenson v. Superior Court,* 35 Cal. 2d 49, 59-61 [216 Pac. 2d 859]; *People v. Sullivan,* 113 Cal. App. 2d 510, 522-523 [248 Pac. 2d 520].)

The California case of *People v. Sullivan* was decided after the *Musser* case and fully considered that case in its opinion and distinguished the California situation from that set out in the Utah case. Certiorari was applied for in the *Sullivan* case and was denied. (*Sullivan v. California,* 345 U.S. 955.)

Equally applicable in the instant case as in the *Sullivan* case is the statement of the California Court in the *Sullivan* case.

> "Furthermore, in the instant case the defendants were fully advised as to the nature of the offense with which they are charged, which was

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not the situation in the Musser case." (*People v. Sullivan,* 113 Cal. App. 2d 510, at 523.)

**B. Section 5002.5 of the California Elections Code is not based on an arbitrary classification of the persons included within its scope, is not vague and uncertain, and does not discriminate against appellant.**

Section 5002.5 of the California Elections Code makes it a misdemeanor for an elective state officer who is authorized to issue licenses or who is the member of a board or agency authorized to issue licenses to solicit money from licensees for any political campaign of any person seeking election to such office or board. Calhoun and Bonelli are charged with conspiring to violate this section. Bonelli was a member of the State Board of Equalization, which licensed the sale of alcoholic beverages.

The California Court adequately disposed of appellant's contention:

> "Calhoun argues that section 5002.5 of the Elections Code creates an unreasonably narrow classification of persons from whom campaign contributions may not be solicited or received. There is no reasonable basis, he asserts, for setting licensees apart from other persons who might contribute to a political campaign.
>
> "In *Ex parte Curtis,* 106 U.S. 371 [1 S.Ct. 381, 27 L.Ed. 232], the court held constitutional a statute prohibiting certain federal officers and employees from giving political contributions to, or receiving them from, each other. 'If contributions from those in public employment may be solicited by others in official authority,' said the court, 'it is easy to see that what begins as a

request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty growing out of the political relations of the parties'. (P. 374; *cf. United States v. Wurzbach,* 280 U.S. 396 [50 S.Ct. 167, 74 L.Ed. 508] [holding constitutional a similar statute under which the defendant was indicted for receiving and being concerned in receiving specified sums in violation of it]; *United Public Workers v. Mitchell,* 330 U.S. 75 [67 S.Ct. 556, 91 L.Ed. 754] [holding the Hatch Act constitutional].)

"[1] Similarly, the Legislature might reasonably conclude that the same danger exists in the case of an elective officer empowered to issue licenses. What might begin as an innocent request or acceptance of a contribution from a licensee might ripen into a demand with which the licensee must comply in order to enjoy the privileges of his license.

"Calhoun contends, however, that there is no reasonable basis for limiting the prohibitions of such a statute to elective state officers authorized by law to issue licenses. Similar dangers exist, he urges, in the case of any other elective officer having the power to favor one making a political contribution. Furthermore, he argues, the statute has been applied discriminately in that there has been no previous prosecution under it.

"Undoubtedly the statute is narrowly drawn and this fact may account for the absence of previous prosecutions under it. The Legislature, however, is free to recognize 'degrees of evil' and deal with the ones which it deems most important. (*West Coast Hotel Co. v. Parrish,* 300 U.S.

379, 400 [57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330]; *Tigner v. Texas,* 310 U.S. 141, 147 [60 S.Ct. 879, 84 L.Ed. 1124, 130 A.L.R. 1321]; *United Public Workers v. Mitchell,* supra, 330 U.S. 75.) There is a reasonable basis for the conclusion that the danger of corrupt practice is greater in the case of the official having direct influence upon the right of the licensee to conduct his business than in other situations."

*Calhoun v. Superior Court,* 46 A.C. 16, 25.

**C. If appellant is attacking the indictment as a pleading he is foreclosed from doing so because this contention was not raised in the Court below.**

In the Jurisdictional Statement, page 4, paragraph numbered 4, appellant poses a question which may be considered as an attack on the indictment as a pleading.

The question of the sufficiency of the indictment as a pleading was not questioned below and was not passed on by the California Court (*Calhoun v. Superior Court,* 46 A.C. 16). The point is not now available.

If this is just another way of attacking the constitutionality of the statutes the matter has been covered under other headings.

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## III.

**IN THE PRESENT POSTURE OF THE CASE THE QUESTIONS PRESENTED ARE NOT RIPE FOR DECISION BY THE SUPREME COURT OF THE UNITED STATES.**

This appeal originates in a proceeding in the Superior Court of the State of California in an attack on the finding of reasonable and probable cause by the San Diego County Grand Jury and *via* a prohibition proceeding it found its way to the Supreme Court of California. Procedurally the case is like to that considered in *Rescue Army v. Municipal Court* (1947), 331 U.S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666, where this Court refused to decide the constitutional questions raised.

It is well-established that the United States Supreme Court will not decide a constitutional question in advance of necessity for its decision. *Alabama State Federation of Labor etc. v. McAdam* (1945), 324 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725. Moreover, it would appear that the Court will not determine or resolve federal questions involved in criminal proceedings in advance of a trial. In the case of *Rescue Army v. Municipal Court* (1947), 331 U.S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666, the United States Supreme Court refused to pass upon the constitutionality of criminal statutes following a denial of a petition for writ of prohibition against a pending prosecution. It specifically held that:

> "... the constitutional issues come to us in highly abstract form. Although raised technically in the separate proceeding in prohibition, they arise substantially as upon demurrer to the charges

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> against Murdock in the criminal proceeding. . . . We are therefore without benefit of the precision which would be afforded by proof of conduct made upon trial."

Furthermore, the United States Supreme Court has held that a federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error. See, *Leonard v. Vicksburg, etc., R. Co.* (1905), 25 S. Ct. 750, 198 U.S. 416, 49 L. Ed. 1108. Since California Penal Code section 182(5) has been before the United States Supreme Court under challenged constitutionality and impliedly upheld, the Court will not accept an appeal involving a purported federal question based upon the unconstitutionality of that section. *Musser v. State of Utah* (1948), 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562, *Sullivan et al. v. California,* 345 U.S. 955, 73 S. Ct. 936, 97 L. Ed. 1376.

Therefore, because of the duty and policy of the United States Supreme Court to avoid decision of constitutional issues and because of the prior considerations of one of the sections contested, there is no substantial federal question involved.

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**CONCLUSION.**

Calhoun and his co-conspirator Bonelli were indicted in January 1955. By reason of one proceeding or another the trial of these defendants has been postponed. Justice delayed is justice denied to society as well as to the individual.

We earnestly pray that this proceeding be speedily terminated. If action on this motion is delayed, the vacation period will intervene and the difficulty of prosecution will increase.

The appeal should be speedily dismissed.

Dated, San Francisco, California,
April 30, 1956.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
*Counsel for Appellees.*